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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF NEW ORLEANS
and
DAVID MICHELL

versus

JOEL W. MARTIN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a District Court of the United States, without committing prejudicial error, give a mere general negligence charge and deny a defendant's request for a jury charge on the doctrine of "sudden emergency", where the doctrine is recognized as a defense by substantive state law of the state in which the District Court sits and the "sudden emergency" issue has been fairly raised by the evidence as defendant's principal defense?

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IN THE
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THE CITY OF NEW ORLEANS
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DAVID MICHELL

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JOEL W. MARTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, the City of New Orleans and David Michell, request that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, (Appendix A, *infra*) is reported at 678 F.2d 1321. The dissenting opinion of Garwood, Circuit Judge, is reported at 678 F.2d 1327. Petitioners application for rehearing was denied on August 11, 1982.

JURISDICTION

(i) The decision of the United States Court of Appeals for the Fifth Circuit of which petitioners seek review was rendered on June 25, 1982.

(ii) The order of the United States Court of Appeals for the Fifth Circuit denying petitioners' request for a rehearing was rendered on August 11, 1982.

(iii) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Plaintiff Joel W. Martin filed suit in the United States District Court for the Eastern District of Louisiana against the City of New Orleans and its employee, Police Officer David Michell, for injuries sustained when the plaintiff was accidentally shot by Officer Michell while Michell was attempting to apprehend the driver of a vehicle which had struck a mounted police officer and had almost run over Michell, after refusing the officer's order to stop. Jurisdiction was based upon diversity of citizenship of the parties.

The Court of Appeals' opinion summarized the evidence at trial:

> On the evening of October 5, 1979, Officer Michell had been patrolling the French Quarter. He received a report over his radio informing him that a late model red Pontiac was careening

through the Quarter and had just struck a mounted policeman. Moments later Michell was at the intersection of Bourbon and Conti Streets when he noticed a red Pontiac proceeding recklessly down Conti. The vehicle nearly hit another policeman, Robert Williams, several pedestrians, and Officer Michell. The Pontiac continued down Conti and then turned right at the next corner onto Royal street. Anticipating that the driver would take a route around the block, Michell ran up Bourbon Street toward Bienville Street to await the return of the Pontiac. As Michell had guessed, the vehicle turned right from Royal onto Bienville and headed back toward Bourbon Street. Standing on Bienville, just before the Bourbon Street intersection, Officer Michell, by gesture and by standing in the street, ordered the driver of the Pontiac to halt. The driver ignored Michell and continued straight ahead almost running him down. At this point in the story, Michell's account of the subsequent events differs from the account given by witnesses for Martin.

Michell testified that he jumped out of the car's path and ran around to the passenger side of the vehicle. When he had observed the Pontiac earlier, Michell thought he had seen two people in the car, but now he saw the driver only. He claimed that he then drew his revolver, approached the front passenger side door, and leaned into the window to see whether the other person was hiding in the back seat. The driver grabbed Michell's revolver and in their struggle, the gun went off.

Betsy Buie and Judy Moscovitc, two of Martin's companions that evening, were standing on Bourbon Street at the Bienville Street intersection just behind the Bourbon Street barricade when

the incident took place. Although they were on the driver's side of the Pontiac, they testified that because they were behind the car, they could see clearly everything that happened on the passenger side. They contended that Michell approached the passenger side, drew his revolver, and using both hands, fired into the open window of the car. They stated unequivocally that Michell was standing completely outside of the car and that at no time did he lean into the car.

After the shot was fired, Martin grabbed the back of his head and sank to his knees. His testimony at trial indicated that at first he did not realize what had happened; he thought he might have been struck by a blunt object. But, almost instantly he was bleeding profusely. His companions rushed over to help him, but no one was able to stop the bleeding. A few minutes later, he was helped into a police squad car and taken to Charity Hospital.

Doctors at the hospital found that he had been shot and that the bullet and several bullet fragments had lodged in the soft tissue at the base of Martin's head and top of his neck. Because it was so close to the spinal cord, the doctors decided it would be too dangerous to remove the bullet. Martin had no other symptoms or complications at that time and was released from the hospital three days later.

Since the incident, Martin has experienced only minimal physical discomfort. Occasionally his neck becomes tired and sore when he remains in one position for a long time. He testified that he continues to suffer emotionally because he is constantly aware of the bullet's presence, and he fears the possibility of future complications. Two neurosurgeons who had examined Martin testi-

fied as to the extent of his injuries and his prognosis. Both testified that Martin's injury was healing well without complications. Because the bullet and its fragments remained in his neck, however, there would always be a risk of complications such as infection, arteriovenous fistula, and increased pain. If the bullet or fragments migrated to the spinal cord, Martin could become partially or totally paralyzed. Corrective surgery for any of these conditions would be dangerous and expensive. The doctors concluded that while the chance that Martin would experience these complications was small, the consequences were serious. 678 F.2d at 1323-4.

The defendants-petitioners requested a jury instruction on the Louisiana doctrine of "sudden emergency." The doctrine had been the "centerpiece of the defense", 678 F.2d at 1329 and was amply supported by the evidence; nonetheless the request was denied, and the case was submitted to the jury on a general "boilerplate" negligence charge. Defendants-petitioners urged a reasonable objection to the charge as given.

After submission the jury inquired, by a note from its foreman, whether Police Officer Michell might in the future be subjected to any criminal liabilities—such as prosecution for murder—if the remote possibilities of future medical complications became actualities. The Court replied that the panel should ignore the possibility of future criminal liability. Thereafter, the jury returned its responses to three interrogatories, finding defendant Michell negligent, finding his negligence the proximate

cause of Martin's injuries, and awarding damages of $500,000.00. Judgment was entered on the verdict. Defendants-petitioners' timely motions for a new trial or remittitur were denied.

Thereafter, an appeal was taken to the United States Court of Appeals, Fifth Circuit, complaining that the trial court erred in refusing the requested jury charge on its principal defense and that the award, being punitive, speculative, and excessive, was not permissible under Louisiana Law.

The panel of the Court of Appeals affirmed, with one circuit judge vigorously dissenting on the "sudden emergency" issue, citing prior decisions of the Fifth Circuit and numerous conflicting opinions of other circuits. An application for rehearing *en banc* was denied.

ARGUMENT

I. PRELIMINARY SUMMARY

Special and important reasons call for the issuance of a writ of certiorari in this case (Rule 17). The Court of Appeals' decision that there was no error in the District Court's refusal to give a special instruction on "sudden emergency" (although that issue was raised by the evidence as defendants' principal defense and is an integral part of Louisiana negligence law) is in conflict with the decisions of several other circuits.

II. THE "SUDDEN EMERGENCY" ISSUE

The jury charge provided for by Rule 51 of the Federal Rules of Civil Procedure is no mere flourish in the conduct of a jury trial. It is the crucial act of the judge by which law is joined to particular facts. It is the touchstone by which a jury becomes a jury rather than an unfettered committee of arbitrators. In a diversity suit, in which the law of the state in which the District Court sits provides the rule of decision on all out-come determinative issues, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 63 S.Ct. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231 (1945). A defective or inadequate jury charge may, in effect, abrogate entire doctrines enshrined in the substantive law of the state. Petitioners submit that such an abrogation of state law has occurred in these proceedings.

Circuit Judge Garwood's dissent in the intermediate court noted that "sudden emergency is an old doctrine almost universally accepted in negligence cases by the courts of Louisiana and the rest of our nation..."[1] 678 F.2d at 1329. Prosser, Handbook of the Law of Torts, 4th Edition (1971), at page 166, calls the doctrine (which he treats at pages 168 *et seq.*) one of those "problems whose fre-

[1] Many of the state courts have held the failure to instruct a jury on the doctrine to be reversible error. See Annotation, Instructions on Sudden Emergency in Motor Vehicle Cases, 80 A.L.R.2d.5. (Note that many counts have also found reversible error in the *giving* of a sudden emergency instruction in factually inappropriate cases—further indication that the state courts do not regard the doctrine as a mere paraphrase of the general negligence rules.)

quent appearance indicates that they are of sufficient importance to call for special notice." The law of Louisiana has given the problem of sudden emergencies such "special notice." The premier commentator on Louisiana tort law has stated that "...it becomes very important that the judge or jury be presented with all the circumstances which produced or affected the situation. These include... (E). A sudden emergency requiring quick action." Stone, 12 La. Civil Law Treatise, Tort Doctrine, §273, 278. See also Comment, 5 La.L.Rev. 432 (1943), excerpted in Malone and Guerry, Studies in Louisiana Torts Law (1970), p.612.

The most recent expressions of Louisiana courts on "sudden emergency" (which is characterized as a "doctrine [which] provides a defense or exception"), *Kaplan v. Missouri Pacific Railroad Co.*, 409 So.2d 298 (La. App. 3d. Cir. 1981) at 307, *Commercial Union Ins. Co. v. Stidom*, 408 So.2d 285 (La. App. 2d. Cir. 1981) are merely the last of a long line of cases by which the *jurisprudence constante* of the state has given the sudden emergency doctrine, as a "doctrine" and denominated as such, a special place in the substantive law of negligence. See, e.g., *Rodgers v. Missouri Pacific Railroad Co.*, 405 So.2d 57 (La. App. 3d. Cir. 1981); *McCrory v. Rochester*, 398 So.2d 1115 (La. 1981); *Security Timber and Land Co. v. Reed*, 398 So.2d 174 (La. App. 3d. Cir. 1981); *Robertson v. Tran's*, 393 So.2d 304 (La. App. 1st. Cir. 1980); *Stansbury v. Hover*, 366 So.2d 918 (La. App. 1st Cir. 1978); *McKenzie v. Nationwide Mutual Ins. Co.*, 363 So.2d 1340 (La. App. 3rd Cir. 1978); *City Auto Wreckers, Inc. v. Wright*, 346 So.2d 873 (La.

App. 4th Cir. 1977); *Johnson v. State Farm Mutual Ins. Co.*, 345 So.2d 1277 (La. App. 3rd Cir. 1977); *Jones v. Fontenot*, 341 So.2d 620 (La. App. 4th Cir. 1977); *Wessinger v. Overton*, 339 So.2d 1272 (La. App. 1st Cir. 1976); *Carney v. State Farm Mutual Automobile Ins. Co.*, 335 So.2d 759 (La. App. 1st Cir. 1976); *Mitchell v. Fowler*, 295 So.2d 41 (La. App. 4th Cir. 1974); *Noland v. Liberty Mutual Ins. Co.*, 232 La. 569, 94 So.2d 67 (La. 1957). In at least one case, *London v. Ryan*, 349 So.2d 1334 (La. App. 1st Cir. 1977), *writ denied*, 351 So.2d 171 (La. 1977), a Louisiana court applied the sudden emergency doctrine to an accidental shooting by a police officer.

The gist of the Louisiana doctrine was stated by Defendants' (petitioners') Requested Jury Charge No. 7, a verbatim excerpt from *Hickman v. Southern Pacific Transport. Co.*, 262 La. 102, 262 So.385, 389 (La. 1972):

> One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all of the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought by his own negligence.
>
> Defendant's Requested Jury Charge No. 7. (See also 65A C.J.S. Negligence § 123; 57 Am. Jr. 2d., negligence § 90 cited by the Louisiana Supreme Court).

In Hickman, as in all the Louisiana cases above cited, the principle stated in Defendant's Jury Charge No. 7 was applied as a "doctrine", as a "rule" of law determinative of the outcome of litigation, and not as merely a more emphatic consideration of one of the circumstances of the case; as the Court of Appeals suggested in the case *sub judice*, at 578 F.2d 1325.[2]

The giving or denial of a jury instruction and the evaluation of its prejudicial or harmless character are matters of federal law, *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970); *Pollock v. Koehring Co.*, 540 F.2d. 425 (9th Cir. 1976); but in a diversity case, the substance of the instructions is determined by state law. *Hopkins v. Metcalf, supra.* Since the sudden emergency rule is "an element of the law of negligence" in Louisiana, *Bautista v. Maryland Casualty Co.*, 201 So.2d 122, at 124 (La. App. 4th Cir.), the doctrine was a proper item for inclusion in the substance of defendants' requested jury charge. And since the request was properly made and supported by the evidence, defendants-petitioners were clearly entitled to it. *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961, 75 S.Ct. 892, 99 L.Ed. 1284 (1955). A District Court refusing to give such an ac-

[2] *Dean v. Travelers Ins. Co.*, 171 So.2d 708 (La. App. 4th Cir. 1965) which the Court of Appeals cites and quotes as a belittlement of the "doctrine" (so-called in *Dean*) as "at most..." serving "to emphasize 'under the circumstances' ", proceeds after the quoted portion to devote the rest of the opinion to a detailed application of the doctrine to the facts of the case. *Jackson v. Indiana Lumbermen's Mutual Ins. Co.*, 175 So.2d 349l (La. App. 2d. Cir. 1965), which the Fifth Circuit cites as in "accord" with *Dean's* belittlement, actually merely cites the *Dean* case as authority for application of the doctrine.

curate, evidence supported, and properly requested charge avoids error only if the subject matter of the requested charge is accurately presented by the charge actually given. *Lind v. Aetna Casualty and Surety Co.*, 374 F.2d 377 (5th Cir. 1967); *Marshall v. Insthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964); *Bolden v. Kansas City Southern Railway Co.*, 468 F.2d 580 (5th Cir. 1972); *United States v. Lewis*, 592 F.2d 1282 (5th Cir. 1979); *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981).

In the instant case, the Court of Appeals held that the substance of the requested charge was adequately conveyed by a boilerplate negligence charge. As the dissent of Judge Garwood put it:

> The majority opinion rests on the history that the general charge adequately covered the matter because it contained the standard definitions that negligence was "the failure to use ordinary care under the circumstances" and that ordinary care "must be viewed in the light of all the surrounding circumstances" [emphasis added]. Of course, such or similar general definitions are given in nearly every negligence case, whether or not there is any question of sudden emergency. The majority opinion is therefore in effect holding that a sudden emergency instruction need never be given.
>
> The majority rationale is that conceptually a sudden emergency is a circumstance, and hence is adequately covered by a plain vanilla "under the circumstances" charge. A certain logical force here cannot be doubted, but, to borrow long familiar phrases, "[u]pon this point a page of

> history is worth a volume of logic," *New York Trust Co. v. Eisner,* 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921), or, as Justice Holmes said on another occasion, "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law (1881).
>
> 578 F.2d 1325 at 1329.

The reasoning of the Court of Appeals attempts to constrain experience in a straight jacket of exaggerated logic and abstraction; it is justification of the reduction of particular and helpful language to useless generality. It is a form of "nothing-buttery", a fiat that henceforth, in the Fifth Circuit the doctrine of sudden emergency, which the courts of the states have seen fit to elaborate in such detail, is "nothing but" a superfluous variant of "under the circumstances." Further quoting Judge Garwood:

> As "sudden emergency" is an old doctrine almost universally accepted in negligence cases by the courts of Louisiana and the rest of our nation, we must assume that experience has proved its utility to judges and juries in the disposition of these cases. While in a conceptual or theoretical sense, the general "under the circumstances" rubric may be broad enough to encompass "sudden emergency," it is evident that in the practical task of deciding negligence cases it has been found helpful and useful, to both fact finders and law appliers, to group in a separate, special class those cases which involve sudden emergencies. Such an emergency is, of course, a circumstance, but it is one that experience teaches is sufficiently different from other classes of circumstances to warrant, as a practical matter, the special

> focus and highlighting which is afforded by the doctrine of sudden emergency. It aids the process of decision making for the judge and jury to be cautioned to pause a minute and in effect remind themselves, if this is a sudden emergency then we should not expect from the actor quite as much as we normally would, because this is a *special* circumstance. (Emphasis in original)
>
> 578 F.2d, at 1329.

It is true that in a strictly logical sense the boilerplate negligence charge comprehends the more particular sudden emergency charge; but only in the sense that a hypothetical jury charge to "Go out and do justice by both sides" comprehends the law in its totality. Such a general charge is, in the abstract, correct; but it fails to inform the juror's mind of those concrete indices, rooted in experience, that are the very purpose of reliance on rules of law, rather than on an untutored and unguided "sense of justice".

This index, "doctrine", "rule" or "element of the law"—the sudden emergency doctrine—is an integral part of the substantive law, of such importance that at least one Louisiana intermediate court has called it an "affirmative defense". *Fontana v. State Farm Mutual Automobile Insurance Co.*, 173 So. 2d 284 (La. App. 3d Cir., 1965), *writ denied*, 247 La. 1027; 175 So. 2d 644 (La. 1965). Nonetheless, the Court of Appeals in these proceedings has held "in effect...that a sudden emergency doctrine need never be given "in the Fifth Circut."[3] Dissenting Opinion, 678 F.2d at

[3] Arguably, the decision below also tolls the death-knell for jury charges on every other particularization of the general law of negligence,

1328. With respect at least to jury charges, this amounts to no less than an abrogation of state law. It is submitted that such an abrogation of a part of state law as a candidate for inclusion in jury charges will surely tend to determine different outcomes in the federal courts than would result in a state court for the Fifth Circuit.

The Fifth Circuit's decision below is in conflict with the decisions of at least three other circuits that have dealt with the issue. See *Cavallaro v Williams*, 530 F.2d 473 (3d Cir., 1975); *Hasselbrink v Spellman*, 246 F.2d 34 (6th Cir., 1957); *Chandler v Edward W. Long, Inc.*, 623 F.2d 1139 (6th Cir., 1980); *Heerman v Burke*, 266 F.2d 935 (8th Cir., 1959); *Stains v Jones*, 500 F.2d 1233 (8th Cir., 1974); *Hopkins v Metcalf*, 435 F.2d 123 (10th Cir., 1970); *Long v Hank*, 457 F.2d 40 (10th Cir., 1972). This conflict between the circuits calls for resolutory review by this Honorable Court.

(Footnote 3 continued)
e.g., last clear chance, age of the tort-feasor, etc. Further, one may infer conversely that the erroneous *giving* of a sudden emergency or similar charge will not be reversible in the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GALEN S. BROWN, hereby certify that I have on November ____, 1982, by United States Mail, postage prepaid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and address being as follows:

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